

The Catholic University of America, Columbus School of Law

CUA Law Scholarship Repository

Scholarly Articles and Other Contributions

Faculty Scholarship

1979

New Directions in the Enforcement of Consumer Credit Laws: From Public to Private and Back Again

Ralph J. Rohner

The Catholic University of America, Columbus School of Law

Follow this and additional works at: <https://scholarship.law.edu/scholar>



Part of the [Banking and Finance Law Commons](#), and the [Consumer Protection Law Commons](#)

Recommended Citation

Ralph J. Rohner, New Directions in the Enforcement of Consumer Credit Laws: From Public to Private and Back Again, 3 OKLA. CITY U. L. REV. 581 (1979).

This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

NEW DIRECTIONS IN THE ENFORCEMENT OF CONSUMER CREDIT LAWS: FROM PUBLIC TO PRIVATE AND BACK AGAIN

RALPH J. ROHNER*

Perspective

The response of sympathetic lawmakers to perceived abuses in the consumer credit field is almost totally predictable. One group will urge the enactment of disclosure rules so that well-informed consumers will be able to look out for themselves in the marketplace. Another group will urge the passage of laws directly prohibiting the distasteful practice, or mandating a corrective mechanism. Both groups will then engage in endless rhetorical debate over the costs and benefits of either approach, the infringements on competition and marketplace freedom, and the burdens on small business.¹

All of these responses take for granted that the disappearance of evil will automatically and immediately follow upon the passage of a statute declaring evil unlawful. That is, the legislators too often assume their fiats will be self-executing, or largely so. Relatively little, and sometimes no, attention is given to establishing enforcement mechanisms that will effectively translate legislative wishes into marketplace realities.

* Member, Federal Reserve Board's Consumer Advisory Council; Summer 1978, Consultant, Federal Deposit Insurance Corporation, Task Force on State and Federal Regulations of Banks; December 1976-present, Consultant on Truth in Lending for the Federal Reserve Board; May 1975-October 1976, Staff Counsel, Subcommittee on Consumer Affairs, Committee on Banking, Housing and Urban Affairs, U.S. Senate.

The author is presently a professor at the Catholic University of America Law School in Washington, D.C., where he has been teaching since 1965. He has also served as the Associate Dean (1969-1971) and the Acting Dean (1968-1969). From 1964-1965, he was an attorney for the Public Health Division of the Department of Health, Education and Welfare. From 1963-1964, he was a teaching assistant at Stanford Law School in Stanford, California. He received his J.D. from the Catholic University of America in 1963, and his A.B. from the Catholic University of America in 1960.

1. This kind of debate is typified in the context of permissible finance charges in consumer credit transactions. The NATIONAL COMMISSION ON CONSUMER FINANCE, REPORT, CONSUMER CREDIT IN THE UNITED STATES (1972) [hereinafter cited as NCCF REPORT] devoted separate chapters to rate regulation and rate disclosure (Chapters 6 and 7 on regulation, Chapter 10 on disclosure); the latter chapter reviews the debate in Congress over the desirability of either approach. The debate does not cease when laws are enacted. See Warren, *Consumer Credit Law: Rates, Costs, and Benefits*, 27 STAN. L. REV. 951 (1975).

The burden of this paper, therefore, is to review some significant developments and trends in consumer credit enforcement by public agencies. Administrative supervision is, to be sure, but one approach to enforcement, but one which this writer believes to have a reviving and vital role in safeguarding consumers in credit transactions.

I. THE SETTING

The explosion of consumer credit laws and regulations over the past decade is altogether unprecedented, both in the amounts of new law created and in the diversity of its sources. The lawmaking bodies include the fifty state legislatures, numbers of city and other local governments, the United States Congress, the Federal Trade Commission, the Federal Reserve Board, other federal and state agencies, and the courts.

Federal-State Legislation

The enactments nationwide are simply too numerous to count, and their sheer number and range of coverage create monumental enforcement problems. (How can an individual consumer hope to keep an accurate and current catalog of all his rights, or even of the disclosure statements describing them? How can the finite staff of the FTC, the Federal Reserve Board, or a state attorney general's office adequately monitor all creditors for compliance with all applicable laws?) Even for the single legislative body that is the United States Congress, it is difficult to comprehend the extent of its entry into the consumer credit regulatory field. Consider the following chronology of congressional activity:

- 1968 Consumer Credit Protection Act,² containing—
 - Title I: The Truth in Lending Act
 - Title II: Extortionate Credit Transactions
 - Title III: Restrictions on Garnishments
 - Title IV: National Commission on Consumer Finance
- 1970 Fair Credit Reporting Act³
- Unsolicited Credit Card Amendments to TIL⁴
- 1974 Fair Credit Billing Act⁵

2. 15 U.S.C. § 1601 (1976).

3. *Id.* § 1681.

4. *Id.* § 1642.

5. *Id.* § 1666.

- Equal Credit Opportunity Act⁶
- Truth in Lending Amendments⁷
- Real Estate Settlement Procedures Act⁸
- 1975 Magnuson-Moss Warranty—FTC Improvement Act⁹
- 1976 Real Estate Settlement Procedures Act Amendments¹⁰
- Discount-Surcharge Amendments to TIL¹¹
- Equal Credit Opportunity Act Amendments¹²
- Consumer Leasing Act¹³
- 1977 Fair Debt Collection Practices Act¹⁴
- Community Reinvestment Act¹⁵
- 1978 Electronic Fund Transfers Act¹⁶
- Right to Financial Privacy Act¹⁷

If anything, the pace is becoming more frenetic; and this is but one lawmaking body. Still at the federal level, the Federal Trade Commission has issued several sweeping trade regulation rules affecting credit transactions, one requiring a cooling-off period in door-to-door sales,¹⁸ another effectively abolishing the holder-in-due-course doctrine,¹⁹ and the Commission has an even more sweeping Credit Practices Rule²⁰ on the drawing boards. The Federal Reserve Board has published hundreds of official and unofficial interpretations of the regulations it has issued under these laws.²¹

State activity has been highlighted by the promulgation of an original and a revised Uniform Consumer Credit Code²²

6. *Id.* § 1691.

7. *Id.* § 1601.

8. 12 *id.* §§ 2601-2617.

9. 15 *id.* §§ 2301-2312.

10. 12 *id.* §§ 2601-2617.

11. 15 *id.* § 1666f.

12. *Id.* § 1691.

13. *Id.* § 1667.

14. 15 U.S.C.A. § 1692 (West Supp. 1978).

15. 12 *id.* §§ 2901-2905.

16. Title XX, Pub. L. No. 95-630, 92 Stat. 3728 (1978).

17. Title XI, Pub. L. No. 95-630, 92 Stat. 3697 (1978).

18. 16 C.F.R. § 429 (1977).

19. *Id.* § 433.

20. 40 Fed. Reg. 16,347 (1975) (to be codified at 16 C.F.R. § 444).

21. Pursuant to the Truth in Lending Act, for example, the Board issued Regulation Z, 12 C.F.R. § 226 (1977). That Regulation in turn provides for the issuance of official Board interpretations, official staff interpretations, and unofficial staff interpretations. *Id.* § 226.1(d). At this writing there have been about 60 Board interpretations, more than 150 official staff interpretations, and more than 1200 unofficial staff letters.

22. The original UCCC was promulgated in 1969, the revised version in 1974.

which, though not widely adopted in their uniform versions, have prompted a great deal of ad hoc legislative activity.²³ To begin to appreciate the enforcement implications of this state and federal lawmaking, consider in the abstract how best to assure compliance with a recent New York state law²⁴ requiring that all consumer credit contracts be written in simple, understandable English!

NCCF Report

In the midst of this maelstrom, the National Commission on Consumer Finance issued its Report,²⁵ in December, 1972, seeking to draw together the experience of the past into a consensus for the future. Its recommendations ranged broadly from marketplace restructuring to very specific suggestions for new or modified transactional protections for consumers. The NCCF Report did not ignore enforcement altogether—an entire chapter is devoted to “Supervisory Mechanisms.”²⁶ But like much of the legislative debate, the Report seems to treat the enforcement dimension as an insignificant appendage to more substantive matters. Discrepancies in enforcement policies among existing federal and state agencies are noted, and the Report recommends equalizing or strengthening enforcement powers for all agencies.²⁷ But the bulk of the NCCF’s discussion is aimed at the question of *which* public agencies should be responsible for enforcement, and not at the question of what those agencies should *do*. The NCCF devotes no attention to the relative strengths and weaknesses of private versus public agency enforcement, except to recognize, poignantly, the plight of the consumer left on his own:

23. Activity in the state legislatures was also influenced by the proposed National Consumer Act, and its successor, the Model Consumer Credit Act, drafted by the National Consumer Law Center in 1970 and 1973, respectively. See Davis, *Legislative Restriction of Creditor Powers and Remedies: A Case Study of the Negotiations and Drafting of the Wisconsin Consumer Act*, 72 MICH. L. REV. 3 (1973).

24. N.Y. GEN. OBLIG. LAW § 5-701 (McKinney 1978).

25. NCCF REPORT, *supra* note 1. The Commission was created by Title IV of the Consumer Credit Protection Act in 1968.

26. *Id.* ch. 4.

27. For example, the Commission recommended allowing state officials to examine federally chartered institutions for compliance with state consumer laws, amending state laws to bring second mortgage lenders under licensure controls, and amending state laws to give a single agency authority to enforce consumer laws against all credit grantors. *Id.* at 60-61.

The absence of any administrative control on behalf of the consumer means that retail credit laws are largely enforceable only by the victims of those who violate these laws. Surely legislators cannot expect consumers who are so poor and ingenuous as to be victimized in credit sales transactions to be wealthy and sophisticated enough to initiate and fight a lawsuit to a successful conclusion against usually well-financed creditors.²⁸

There is no discussion of the various techniques a public agency might bring to bear both to prevent recurrence of unlawful practices and also to provide meaningful remedies for the consumer victims of past practices. Yet it was precisely this kind of lack of imagination that underlay much of the criticism of the Federal Trade Commission in the Nader²⁹ and American Bar Association³⁰ reports in the 1960's, criticism which has led the Commission to test its own powers in recent years.

Until very recently, post-NCCF discussions of enforcement strategies seem to assume that private enforcement is and should be the dominant technique. Providing strong inducements for individuals to vindicate their own rights was introduced in the Truth in Lending Act at the federal level.³¹ The debate about the desirability of these inducements has continued in connection with subsequent federal statutes, especially with respect to class action recoveries based on these formulas. The lack of strong private enforcement in the original Uniform Consumer Credit Code prompted strong criticism,³² and the revised version more closely parallels the Truth in Lending model.³³ But as will be suggested below, enforcement by private action has distinct limitations under the best of circumstances; it may also be inadequate and at times counter-productive in achieving the most efficient and widespread levels of compliance. In any event no one appears to believe that private enforcement should be the exclusive methodology

28. *Id.* at 48.

29. E. COX, R. FELLMETH & J. SCHULZ, *THE CONSUMER AND THE FEDERAL TRADE COMMISSION* (1969).

30. AMERICAN BAR ASSOCIATION, *REPORT OF THE A.B.A. COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION* (1969).

31. Truth in Lending Act § 130, 15 U.S.C. § 1640 (1976).

32. *E.g.*, Spanogle, *Why Does the Proposed Uniform Consumer Credit Code Eschew Private Enforcement?*, 23 BUS. LAW. 1039 (1968).

33. See Uniform Consumer Credit Code § 5.201 (1974 version).

across the spectrum of federal and state consumer credit laws. The question, therefore, remains open whether the role of the public agency can be improved, in terms both of cost efficiency and of producing real consumer protection.

Traditional Patterns of Agency Enforcement

As a further preface, it is worth noting the conventional strictures within which public consumer protection agencies have operated. For one, specially-formed consumer protection offices are likely to be politically vulnerable institutions in the sense that they must tangle with industries holding vested interests and great economic power, on behalf of nondescript customers having little economic clout. As a by-product, these agencies are rarely adequately funded; they may be unable to attract or retain the highest quality personnel and those on board are usually spread terribly thin. Their resources will often not permit regular, systematic examination of the practices of all the creditors under their supervision. This is certainly true of the Federal Trade Commission and probably also of many state agencies, especially with respect to retail sales creditors not subject to licensing or regular examination.³⁴ This circumstance makes the agency a responder rather than an actor: it is dependent on an inflow of consumer complaints or on the more or less accidental discovery of patterns of abuse. In other cases the agency may be little more than a licensing board, dominated by industry interests, with few resources and even fewer enforcement tools.³⁵

In the case of deposit-holding creditors (banks, credit unions, savings and loan associations), where the supervisory agency does conduct regular and systematic examinations of institutional practices, the problem is different. It is attitudi-

34. The NCCF REPORT, *supra* note 1, at 57-58, observed:

State legislatures in the last two decades have enacted countless consumer protection statutes but have been reluctant to appropriate funds to enlarge consumer protection agencies in order to enforce these laws. State agencies usually have adequate financing only when creditors pay for examinations, as with agencies examining deposit-holding institutions or consumer finance companies.

35. This was the case with state supervision of independent debt collection agencies, where the weaknesses in state enforcement provided the opening for congressional enactment of the Fair Debt Collection Practices Act. Pub. L. No. 95-109, 91 Stat. 874 (to be codified at 15 U.S.C. § 1692); see H.R. REP. No. 95-131, 95th Cong., 1st Sess. (1977).

nal. Bank examiners traditionally have been concerned primarily with depositor and investor protection ("safety and soundness") and not with borrower protection. Supervisors occupying "good old boy" relationships with their banks were not likely to take a hard line on consumer protection.

Most such agencies are further strapped by administrative procedures which bog down the staff, dissipate resources, and preclude quick, sharp action.³⁶ Even cases suitable for bringing immediately to court for injunctive relief may require extensive investigation and negotiation beforehand lest the agency risk an embarrassing dismissal at the courthouse.

As limiting as any of the characteristics above may be, none compare to the narrow form of relief typically available to public agencies in the past. Using the FTC as an example, the agency's sole internal remedy (beyond consent orders or voluntary compliance) was the entry of an order directing a specific violator to cease and desist from an unlawful practice.³⁷ This was uniformly taken to mean that the agency could bar *future* unlawful conduct, but could do virtually nothing in the way of providing recompense for past victims.³⁸ It could not even proscribe future conduct without producing substantial evidence of explicit past violations. Respondents could modify their practices somewhat—enough to take them outside of the literal reach of the order—and otherwise continue as before. In many cases, the entry of a cease and desist order might be an empty victory for the agency, as in the case of advertising violations where the offensive advertising motif had long since been discontinued.

Alternative remedies were too draconian to be of much day-to-day use. For creditors holding federal or state charters

36. In the classic case of *Carter Prod., Inc. v. FTC*, 268 F.2d 461 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959), it took 16 years to compel respondent to drop the misleading reference to "liver" in "Carter's Little Liver Pills." Rothschild and Carroll report that delays of three to five years between issuance of an FTC complaint and final issuance of a cease and desist order are not uncommon. D. ROTHSCHILD & D. CARROLL, *CONSUMER PROTECTION: TEXT AND MATERIALS* 91 (1977). The Commission did not get statutory authority to seek immediate injunctive relief until 1973, in a rider to the Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 408, 81 Stat. 577 (amending 15 U.S.C. § 45 (1970)).

37. See D. ROTHSCHILD & D. CARROLL, *supra* note 36, §§ 3.07-.16; Kintner & Smith, *The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency*, 26 MERCER L. REV. 651 (1975).

38. *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974).

or licenses, there is the threat of suspension, nonrenewal, or revocation of that operating permit. Understandably, this remedy has rarely been used.³⁹ Criminal prosecutions of consumer credit violators are similarly few and far between.⁴⁰

It is thus not an exaggeration to suggest that public agency capabilities in the past have not been conducive to thorough and vigorous enforcement of consumer rights. In general those agencies have considered themselves virtually powerless to do more than restrain continuing abuses. In this light it is encouraging to note that some such agencies (sometimes with a boost or a prod from the legislature) have begun to exhibit an ability and a willingness to take a more active and imaginative enforcement role.

II. THE ENFORCEMENT PROBLEM

To gauge the need for strong and active agency enforcement activity, one needs to accept some premises. The starting point is that existing consumer credit protection laws are worth enforcing—that is, they will provide genuine benefits to consumers if enforced. To be sure, this may be a debatable proposition in the context of legislative consideration of specific measures.⁴¹ But once legislative standards are on the books, and until they are amended or repealed, they deserve the benefit of any doubt when it comes to establishing enforcement policies. Certainly the justification for many consumer protection rules, such as prohibitions of “unfair or deceptive acts or practices” or of discrimination in credit granting, are beyond question. The remainder of this article, therefore, will not dispute that

39. But see Miller, *Enforcement of the Uniform Consumer Credit Code: Observations from the Oklahoma and Federal Experience*, 51 N.C. L. REV. 1229, 1259-60 (1973), where Professor Miller reported that eight revocation or suspension of license proceedings had been commenced in Oklahoma since enactment of the UCCC. See also Note, *Administration of the Uniform Consumer Credit Code*, 8 IND. L. REV. 828 (1975); Comment, *Deceptive Trade Practices in the Marketplace: Consumer Protection by the New York Government Agencies*, 3 FORD. URB. L.J. 491 (1975).

40. The Truth in Lending Act, which has produced a torrent of civil litigation, also provides for criminal sanctions. Truth in Lending Act § 112, 15 U.S.C. § 1611 (1976). There are no reported cases of criminal prosecutions for Truth in Lending violations.

41. Enactment into law obviously does not cloak consumer protection measures with infallibility either. Witness the congressional turn-around on the Real Estate Settlement Procedures Act. See Rohner, *Consumer Credit Legislation in the 94th Congress—and a Look Ahead*, 9 UCC L.J. 307, 345-49 (1977).

the goals of consumer credit laws are in fact desirable.

A second premise is that victimized consumers cannot always protect their rights on their own. There will inevitably be occasions for consumers engaging in marketplace credit transactions to encounter violations of existing standards, violations resulting from creditor ignorance of the law, from inadvertence, or from malice. For our purposes the motive of the creditor is irrelevant (though it may affect the appropriateness of a given remedy) if the consumer has in fact been subjected to an unlawful practice. If the consumer discovers the deprivation of rights, what can he or she do about it? The consumer may plead, negotiate, and demand correction from the creditor,⁴² but with little leverage or bargaining power and perhaps with no obvious corrective remedy. (Consider the consumer who responds to a bait-and-switch sales pitch and ends up with a more expensive, but better quality, vacuum cleaner. What are the damages?) Where the stakes are more substantial and more measurable—as where the creditor improperly forecloses on collateral—the consumer is unlikely to make much progress seeking an informal correction. An alternative is litigation with the creditor, but the consumer's obstacles here are numerous and obvious. They consist of all the disincentives for litigation over modest dollar amounts: the need to retain counsel, litigation costs and delays, the uncertainty of victory, and the difficulties of collecting a sufficient judgment to cover damages and the litigation costs themselves. The consumer who knows he has been victimized but who rationally chooses not to litigate is left with nothing but a festering sense of resentment.⁴³

Even the courageous individual who presses his rights to the hilt and prevails adds little to the breadth of the enforcement power. Though that consumer may be made whole, his victory may do little or nothing to dissuade the creditor from a pattern of unlawful conduct. Indeed, a creditor may be willing to settle generously with the occasional consumer who asserts his rights, in the expectation that many other consumer victims will not be so resourceful. Unless unusually altruistic, the

42. See generally Ross & Littlefield, *Complaint as a Problem Solving Mechanism*, 12 LAW & SOC. REV. 199 (1978).

43. It is worth recalling that the landmark Kerner Commission Report in 1968 identified fraudulent marketplace practices as a source of great resentment and as one of the causes of urban civil unrest. KERNER COMMISSION REPORT, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 139-40 (1968).

consumer who litigates for his personal remedy is unlikely to seek the added remedy of enjoining the creditor's unlawful course of conduct. This could involve litigation complexities and risks not commensurate with the consumer's immediate goal. Thus individual consumer victories through litigation do not necessarily translate into effective deterrents of future abuses. And the fact remains that the litigated abuse ought not to have occurred in the first place.

For the larger numbers of consumers who never realize that their creditors have acted unlawfully, reliance on enforcement through private suits is *a fortiori* futile. It is the nature of deceptive practices to go undetected; abuses associated with consumer credit transactions may be quite subtle and violations (for example of Truth in Lending) unapparent except on the closest scrutiny by expert counsel.⁴⁴ There is of course some possibility that latent violations will turn up when the consumer defaults and engages counsel to defend a collection action,⁴⁵ but this merely places the consumer back in a position of knowing that he is a victim. All the obstacles and disincentives to a remedy remain.

The problem, therefore, is that to leave the consumer to his own devices in the current environment of extensive, complex, and multi-jurisdictional credit laws is to leave him without rights. His exposed situation might be compared to that of a crime-infested city without policemen, likely to produce more innocent victims than rugged individualists capable of self-defense.

III. THE INADEQUACIES OF NON-AGENCY ENFORCEMENT

To pursue the analogy in the previous paragraph a step further, it might theoretically be possible to provide the citizenry with additional protections without maintaining a large, expensive, and bureaucratic police force, either through kinds of "vigilante" groups or by giving individuals better weapons for their own protection. Efforts in these directions in the consumer credit enforcement area have not been notably successful—probably for many of the same reasons that true vigilantes

44. Cf. Landers, *Some Reflections on Truth in Lending*, 1977 U. ILL. L.F. 669, 680-83 (1977) (description of this pattern in the Truth in Lending context).

45. *Id.* at 671-76.

and concealed pistols have faded from the law enforcement scene.

Voluntary Dispute-Settlement Mechanisms

Little can be said about the possible utility of industry-sponsored arbitration or similar voluntary dispute-settlement techniques, because little has been tried in the credit area. Arbitration tribunals are available under the auspices of the Better Business Bureaus in many areas,⁴⁶ and presumably are open to the hearing of credit disputes. This writer is simply unaware of any extensive use of them in this regard, nor is he aware of any credit-industry review panels such as exist in several of the sales fields. No effort has been made in any consumer credit legislation to encourage the establishment of industry mechanisms, such as was done in the Magnuson-Moss Warranty Act.⁴⁷

A more obvious potential aid to correcting violations of law is each creditor's concern for customer relations. Few conscientious creditors enjoy the notoriety of mention in a local "Action Line" column; even fewer enjoy defending a law suit (or justifying that expense to their board of directors). The answer—for those creditors who can afford the luxury—is the maintenance of a complaint office or desk which is managed honestly and forthrightly, as well as the maintenance of a high level of quality control in training, supervising, and supplying credit personnel. For plastic card issuers there are some legal inducements in this direction in the provisions of the Fair Credit Billing Act⁴⁸ and the recent Electronic Fund Transfers Act⁴⁹ which spell out certain dispute-settlement procedures.

The trouble with these essentially voluntary enforcement devices is that they tend to exist where they are least needed. The large bank or retailer may feel it cannot afford *not* to use available arbitration or maintain a full-time complaint officer, but the smaller creditor's business volume may not justify such efforts. Voluntary devices suffer the further frailty that they are

46. See Jones, *Wanted: A New System for Solving Consumer Grievances*, 25 ARB. J. 234, 239-40 (1970), reprinted in D. RICE, CONSUMER TRANSACTIONS 872-75 (1975), for a description of other organizations which sponsor arbitration panels.

47. Magnuson-Moss Warranty — Federal Trade Commission Improvement Act § 110(a), 15 U.S.C. § 2310 (1976).

48. 15 U.S.C. § 1666 (1976); see Regulation Z, 12 C.F.R. § 226.14 (1977).

49. Title XX, Pub. L. No. 95-630, 92 Stat. 3728 (1978).

geared to *ad hoc* resolutions and do not serve a strong deterrent or preventive function.

Distinct mention should be made here of a sort of "ombudsman" function performed by many public enforcement agencies: acting on individual consumer complaints. While this function is clearly an adjunct to their overall enforcement responsibilities, it leaves the agency considerable leeway to use conciliation, negotiation, compromise, and other essentially voluntary adjustment techniques. It is noteworthy that the Uniform Consumer Credit Code expressly authorizes the Administrator to "receive and act on complaints."⁵⁰ Recent federal legislation imposes an even more explicit duty on the bank regulatory agencies to "establish a separate division of consumer affairs which shall receive and take appropriate action upon complaints."⁵¹ Still, other supervisory agencies, including the FTC, have not shown any inclination to engage in case-by-case dispute-settlement activity (perhaps because of the sheer volume of incoming complaints), but presumably do use complaints as a basis for initiating formal enforcement proceedings or for evaluating license or charter applications. The point is that the resources of public enforcement agencies may lend themselves to achieving amicable, voluntary settlements in many cases, where the agency acts in only a quasi-official arbitrator's role.

Private Judicial Enforcement

The suggestion is made above that under even the best circumstances enforcement of consumer credit laws through private lawsuits can have only a limited effectiveness. It presumes in every case a consumer cognizant of his rights and willing to take the initiative and the considerable risks of litigation.

Awareness of these barriers has led to a number of efforts to make private enforcement more palatable. (Some of these efforts run far beyond the bounds of consumer *credit* protection.) One example is the attempt to revitalize the system of small claims courts so that consumers can obtain judicial re-

50. UNIFORM CONSUMER CREDIT CODE § 6.104(1)(a) (1974 version).

51. Federal Trade Commission Act § 18(f)(1), as amended by 15 U.S.C. § 57a (1976).

view of their claims conveniently, expeditiously, and cheaply.⁵² There is no doubt that progress has been made in making small claims courts suitable for consumer redress as well as creditor collections, but these courts are confined by their own parameters. They have limited jurisdictions, may be no more accessible than the regular courts, and may be conducted by judges more disposed to assembly-line processing of cases, or to compromise settlements, than to careful protection of consumer rights.

The Truth in Lending Experience

A signal effort was made in the Truth in Lending Act to bring individual consumers into the enforcement picture; experience under that Act therefore offers a base from which to estimate the maximum possible scope of private enforcement. First, the Act imposes liability without fault: virtually any noncompliance with the complex disclosure rules is a violation.⁵³ Second, the consumer who proves a violation recovers any actual damages plus twice the finance charge in the transaction (but no more than \$1000 and no less than \$100).⁵⁴ Third, the consumer is entitled as well to attorney's fees and costs.⁵⁵ Finally, the action can be brought in any federal district court without regard to jurisdictional amount.⁵⁶

It was clearly Congress' intent to make each consumer debtor a mini-policeman of the statutory disclosure scheme, and the inducements were designed for that purpose as well as to take some of the enforcement burden off existing line agencies. What the law has produced, however, may bear little resemblance to what Congress envisioned. Truth in Lending has become a volcanic source of litigation, with case filings recently running at better than 2000 per year in the federal courts

52. See generally NATIONAL INSTITUTE FOR CONSUMER JUSTICE, REPORT, REDRESS OF CONSUMER GRIEVANCES (1973); Eovaldi & Gestrin, *Justice for Consumers: The Mechanisms of Redress*, 66 NW. U.L. REV. 281 (1971); Wexler, *Court-Order Consumer Arbitration*, 28 Arb. J. 175 (1973).

53. Section 130(a) of the Act imposes liability on "any creditor who fails to comply with any requirement," without reference to motive, intent, or exercise of care. Subsection 130(c) does provide a "bona fide error" defense for creditors, but this has been narrowly read to include only clerical errors. *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971).

54. 15 U.S.C. §§ 1640(a)(1), (2)(A)(i) (1976).

55. *Id.* § 1640(a)(3).

56. *Id.* § 1640(e).

alone.⁵⁷ Rarely if ever do consumers prove any actual damages resulting from the disclosure violations. Indeed, it is virtually incontrovertible that most TIL lawsuits originate not in the consumer's discovery of a disclosure defect but in the customer's default or other dispute with the creditor that leads the consumer to a lawyer who finds an actual or arguable TIL violation which becomes the consumer's sword or shield in the ensuing litigation.⁵⁸

The volume of this litigation had led courts into more and more arcane constructions of the Act,⁵⁹ into conflicting interpretations,⁶⁰ and into outright disagreement⁶¹ with the Federal Reserve Board, which has regulatory responsibility for the Act. For individual creditors it has led to constant apprehension about liability and to recurrent reprinting of disclosure forms to keep pace with judicial developments. At the legislative level, it has led Congress to enact a unique provision under which a creditor may get a so-called "blessed letter" from the Federal Reserve Board staff which protects him from liability so long as he does as the letter advises.⁶² It has also led the Senate, in a recently passed TIL Simplification bill, to reduce both the number of required disclosures and the kinds of violations that will support an award of damages.⁶³

The Congress, back in 1968, also failed to consider the potential use of the class action device in conjunction with the TIL formula for damages. Consumers' lawyers did not overlook the possibilities for long, however, and what has ensued has been a running skirmish between creditors desperately trying to avoid large penalty awards and consumers seeking minimum

57. Data supplied by the Administrative Office of the United States Courts is reported in *CAPITOL REPORTS, INC., WASHINGTON CREDIT LETTER* 45 (Nov. 28, 1977).

58. See Landers, *supra* note 44.

59. For example, may a creditor use a subtractional sequence for his disclosures, or must they be in additive form? See *Allen v. Beneficial Fin. Co.*, 531 F.2d 797 (7th Cir.), *cert. denied*, 429 U.S. 2465 (1976).

60. On the question, for example, whether an acceleration clause is a default charge, compare *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975) with *Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977) and *McDaniel v. Fulton Nat'l Bank*, 543 F.2d 568 (5th Cir. 1976).

61. *Jones v. Community Loan & Inv. Corp.*, 526 F.2d 642 (5th Cir. 1976), *aff'd on rehearing*, 544 F.2d 1228 (5th Cir. 1976), *cert. denied*, 431 U.S. 934 (1977).

62. 15 U.S.C. 1640(f) (1976); see Regulation Z, 12 C.F.R. § 226.1(d)(3) (1975) (amended 1976).

63. S. 2802, 95th Cong., 2d Sess. (1978); see S. REP. No. 95-720, 95th Cong., 2d Sess. (1978).

recoveries multiplied by the total number of the creditor's customers. The advantage seems to have shifted back and forth. After several courts had perfunctorily certified class actions under Rule 23 of the Federal Rules of Civil Procedure, a federal judge calculated the stakes in an action brought against a bank by a class of 130,000 credit card holders.⁶⁴ The judge found that a possible \$13,000,000 judgment against the bank for what was a relatively harmless error was intolerable and refused to certify the class on that basis. This landmark decision slowed the rate of class certifications.

To retain the enforcement threat represented by a class action, but also to protect creditors from possibly "annihilating" recoveries, Congress responded by setting a ceiling on the amount recoverable in a TIL class suit: \$100,000 or one percent of the creditor's net worth, whichever is less.⁶⁵ Two years later, apparently fearful they had closed the door too far, Congress upped the ceiling to \$500,000.⁶⁶ This, together with class action restrictions from other quarters,⁶⁷ at least prevented an eruption of large class recoveries—for a while. Then in an interesting case, in which the court used a mathematical probability formula to compute *actual* damages to class members, it also entered what appears to be the first TIL class action award of civil penalties. And the court awarded the maximum amount, \$100,000.⁶⁸

More ominous, from a creditor's point of view, is a later case from the federal district court in Charlotte, North Carolina.⁶⁹ Finding numerous violations in a chain department store's disclosure statement, the court awarded the full \$100,000 ceiling amount to a class of some 700 customers of one branch store. The court justified its maximum award in part

64. *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972).

65. TILA § 130(a)(2)(B) (as amended by Pub. L. No. 93-495, § 408(a) (1974)).

66. TILA § 13(a)(2)(B) (as amended by Pub. L. No. 94-240, § 4(3) (1976)). All these developments are discussed and carefully analyzed in Comment, *Truth in Lending and the Federal Class Action*, 22 VILL. L. REV. 418 (1977). See also LeValley & Walker, *Truth in Lending Class Actions Under Amended Section 130*, 24 KAN. L. REV. 471 (1976); Note, *Recent Developments in Truth in Lending Class Actions and Proposed Alternatives*, 27 STAN. L. REV. 101 (1974).

67. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (Supreme Court held that class plaintiffs must bear the expense of notifying class members).

68. *Eovaldi v. First Nat'l Bank*, 57 F.R.D. 545 (N.D. Ill. 1972), *motion granted*, 71 F.R.D. 334 (N.D. Ill. 1976).

69. *Barber v. Kimbrell's, Inc.*, 424 F. Supp. 42 (W.D.N.C. 1976).

on the ground that the store had used the same forms in all forty-eight of its branches (thus affecting a lot of people). What the court did not acknowledge is that this would automatically leave the department store chain exposed to forty-eight separate judgments for \$100,000 in favor of the customers of each of its outlets! Although the court of appeals reversed and remanded on the question of the appropriate measure of damages,⁷⁰ class actions for civil penalties may still be something of an uncontrolled beast in the Truth in Lending area.

It is difficult to know exactly what to make of the Truth in Lending experience. It has created private enforcement with a vengeance and has generated amazingly intense creditor disfavor. Regretably, and importantly, it does not seem to have greatly improved the level of compliance, if the continuing volume of litigation is a measure. The cases seem to feed on one another: the answer to one interpretational question begets two more. This pattern seems to make TIL allegations a favorite technique of consumer lawyers, whether their clients feel particularly aggrieved by the violation or not.⁷¹ The combination of all these factors provide every incentive for at least knowledgeable consumers to use TIL suits for purposes other than the remedying of the disclosures themselves. The TIL experience may, therefore, be somewhat aberrational and not a reliable gauge of the optimal utility of private enforcement.

Other Statutory Examples

Several other federal statutes, also parts of the CCPA umbrella, provide useful comparisons to Truth in Lending with respect to private enforcement. All of them, like TIL, contain a basic division of enforcement authority between existing public agencies and individual consumers, but the specific inducements to private suits are quite different.

The Fair Credit Reporting Act provides the sharpest contrast. Consumers may sue in federal court without regard to jurisdictional amount, and if successful may recoup their attorney's fees and court costs.⁷² But there the resemblance to Truth in Lending ends. Liability exists only where there is fault (neg-

70. *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978).

71. *Landers*, *supra* note 44, at 677-79.

72. Fair Credit Reporting Act §§ 616(3), 617(2), 618, 15 U.S.C. §§ 1681n(3), 1681o(2), 1681p (1976).

ligent or willful noncompliance),⁷³ and for negligence the measure of recovery is limited to actual damages. In addition the Act authorizes no interpretive regulations, so there is not an overlay of complex requirements comparable to TIL's Regulation Z. Not surprisingly, litigation under FCRA has been relatively scarce, and the cases reflect rather more substantive than technical disputes about the Act's requirements and the existence of actual injury.⁷⁴

One might think that legislation such as the Equal Credit Opportunity Act, aimed as it is at discrimination in granting credit, would prompt some litigation born out of emotion as well as out of cold calculation of statutory rights. But ECOA litigation, in the first three and one-half years of the Act's existence, has been scant.⁷⁵ This is doubly surprising because the Act's legislative history incorporates the "effects test" from the employment discrimination area, through which the aggrieved customer establishes a *prima facie* case by showing statistically less favorable treatment of protected groups.⁷⁶ The Act also permits recoveries up to \$10,000 in individual actions,⁷⁷ compared to TIL's ceiling of \$1,000. Part of the explanation for the lack of litigation undoubtedly lies in the newness of the Act. But a more solid reason lies in one simple facet of the implementing regulation: it provides model application forms which creditors can use with assurance that they are in compliance.⁷⁸ Thus the law takes out of ECOA plaintiffs' hands the most effective weapon their TIL counterparts have—defective forms; also, under ECOA the application forms are filled in (most likely) by the consumer, while it is the creditor who must execute and deliver the TIL disclosures. Thus substantive differences, newness, and approved forms set ECOA

73. *Id.* §§ 616, 617, 15 U.S.C. §§ 1681n, 1681o.

74. See Note, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability*, 76 COLUM. L. REV. 458 (1976).

75. Reported cases include *Smith v. Lakeside Foods, Inc.*, 449 F. Supp. 171 (N.D. Ill. 1978); *Carroll v. Exxon Co., U.S.A.*, 434 F. Supp. 557 (E.D. La. 1977).

76. See Regulation B, 12 C.F.R. § 202.6(a) n.7 (1977); S. REP. NO. 94-589, 94th Cong., 2d Sess. 4-5 (1976); H.R. REP. NO. 94-210, 94th Cong., 2d Sess. 5 (1975). That legislative history cites explicitly to the equal employment cases of *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). An unsuccessful attempt was made to invoke the "effects test" in *Carroll v. Exxon Co., U.S.A.*, 434 F. Supp. 557 (E.D. La. 1977).

77. Equal Credit Opportunity Act § 706(b), 15 U.S.C. § 1691e(b) (1976).

78. Regulation B, 12 C.F.R. § 202, app. B (1977).

apart from TIL, and probably mean there will never be a TIL-like torrent of ECOA lawsuits.

Two other examples underscore Congress' uncertainty about the ideal combination of inducements for private enforcement. The recently passed Fair Debt Collection Practices Act⁷⁹ mirrored the TIL formula, with two exceptions: the \$100 minimum recovery was dropped (to discourage bounty hunters?), and there was an explicit prohibition of any elaborative regulations or trade regulation rules.⁸⁰ The 1976 Consumer Leasing Act also adopted the TIL formula, but again with two novel gimmicks: the statute of limitations for private suits runs for one year from the *termination* of the lease,⁸¹ not from the time of the violation as under TIL; and injured consumers may sue for lease *advertising* violations,⁸² contrary to the rule for TIL credit advertising violations which can only be policed by a public agency.⁸³

Some further confirmation for the uniqueness of the TIL experience can be drawn from the relative scarcity of case law under state laws containing explicit inducements to private litigants very much like those in TIL.⁸⁴ We may speculate that the reason for the dearth of private suits in those states is the presence of strong administrative enforcement and resulting high levels of compliance. We may also surmise that the TIL litigation explosion, while an impressive indication of how the right combination of circumstances can bring individual consumers into enforcement roles in droves, is an atypical, distorted image of what private enforcement should look like.

79. Act of Sept. 20, 1977, Pub. L. No. 95-109, 91 Stat. 874 (adding a new Title VIII to the Consumer Credit Protection Act) (to be codified at 15 U.S.C. § 1692).

80. Fair Debt Collection Practices Act §§ 813(a)(2)(A), 814(d), 15 U.S.C.A. §§ 1692k(a)(2)(A), 1692l(d) (West Supp. 1978).

81. Consumer Leasing Act § 185(c), 15 U.S.C. § 1667d(c) (1976).

82. *Id.* § 185(b), 15 U.S.C. § 1667d(b).

83. Section 130 of the Truth in Lending Act provides a private cause of action only for violations of chapters 2, 4 and 5 of the Act. The advertising provisions are in chapter 3. See *Jordan v. Montgomery Ward & Co.*, 442 F.2d 78 (8th Cir.), *cert. denied*, 404 U.S. 870 (1971).

84. For example, there appear to be no more than a half-dozen reported cases under the Wisconsin Consumer Act. See [1977] 5 CONS. CRED. GUIDE (CCH) ¶¶ 98,072; 98,073; 98,146; 98,452; 98,698; 98,716. The first case to reach that state's supreme court was *Wachal v. Ketterhagen Motor Sales*, 81 Wis. 2d 605, 260 N.W.2d 770 (1977).

Implying a Private Remedy

Not all statutory consumer protections provide an explicit private remedy, of any kind. For an individual consumer to avail himself of anything from violations of such laws, that consumer must persuade a court not only that the creditor's actions are in fact in violation but also that a private remedy is implied in the statutory scheme, either through legislative history or as a judicially-recognized adjunct. Consumers have had only occasional successes in these arguments.

Examples of legislation which carry no built-in private remedy are manifold. State laws regulating small loans and credit sales often left the consumer's obligation unaffected by the creditor's failure to comply, in favor of criminal sanctions or exclusive administrative enforcement.⁸⁵ The original version of the UCCC was in this mold, and criticism of this reliance on policing by public agencies led to the inclusion of much stronger private remedies in the revised version.⁸⁶ In some contexts, however, such as with a state law requiring auto repairmen to give binding estimates, courts *have* recognized the need for, and the implied legislative approval of, a private remedy.⁸⁷ At the federal level, this pursuit of a private remedy has produced a split in the case law with respect to the anti-firing provisions in the CCPA's garnishment title.⁸⁸

The most pervasive source of potential implied private rights lies in the FTC Act's broad proscriptions against unfair or deceptive acts or practices, augmented by the volumes of case-by-case adjudications of those standards. But it is precisely here, where private actions might fruitfully reinforce the Commission's own enforcement efforts, that courts have balked. With the recent exception of a single federal district court,⁸⁹ whose holding was itself rejected shortly thereafter,⁹⁰ the courts have consistently refused to permit private recover-

85. See B. CURRAN, TRENDS IN CONSUMER CREDIT REGULATION 42-44, 117-18 (1965).

86. Compare UNIFORM CONSUMER CREDIT CODE § 5.202 (1969 version) with *id.* § 5.201 (1974 version); see Spanogle, *supra* note 32.

87. *Bennett v. Hayes*, 53 Cal. App. 3d 700, 125 Cal. Rptr. 825 (1975).

88. Compare *Stewart v. Travelers Corp.*, 503 F.2d 108 (9th Cir. 1974) with *Western v. Hodgson*, 359 F. Supp. 194 (S.D. W.Va. 1973).

89. *Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582 (N.D. Ind. 1976).

90. *Summey v. Ford Motor Credit Co.*, 449 F. Supp. 132 (D.S.C. 1976); *Bott v. Holiday Universal, Inc.*, [1976] 2 TRADE REG. REP. (Trade Cases) 69,301.

ies premised on violations of the FTC Act.⁹¹ Presumably these holdings would carry over as well to creditor conduct violating the specific terms of a trade regulation rule. This could then produce the anomalous result that if a creditor failed to include the FTC anti-holder-in-due-course notice in a credit agreement, the creditor might be prosecuted by the Commission but the consumer might also have to pay a third-party financier who qualified for holder-in-due-course status under state law.⁹²

Being judicially created rather than statutorily authorized, private enforcement by "implication" would carry additional disabilities. It is doubtful the consumer could recover anything more than provable actual damages; recent Supreme Court opinions also make it very unlikely the consumer could recoup attorney's fees and costs without a statutory directive.⁹³ Short of amending the FTC Act in this regard, the only way of giving individual consumers the benefit of the FTC's experience is by state enactment of "little FTC" acts which explicitly adopt FTC rulings as standards of deceptiveness or unfairness, and which provide a state-law private remedy.⁹⁴

Either technique—implying a private remedy or incorporating federal standards by reference—smacks of being a back door entry for private enforcement. None of the extant approaches, including the wide-open one in Truth in Lending, comes close to making private enforcement an efficient or universally usable remedial technique. None of these approaches significantly aids the consumer in recognizing his rights in the first place; none offers the inducement of counsel fees or expenses if the case is settled short of trial; all leave the consumer with most of the disincentives of any civil litigation: expense, uncertainty, delay, and the possible inappropriateness of any remedy.

The discussion to this point has stressed the weaknesses of private enforcement and the futility of relying on it as the exclusive or dominant enforcement mode. This is certainly not to say that private enforcement has *no* importance. Where the

91. *Holloway v. Bristol-Meyers Corp.*, 485 F.2d 986 (D.C. Cir. 1973).

92. This result would probably be more theoretical than real, for any competent consumer lawyer ought to be able to make a persuasive argument that a financier who knowingly purchases consumer paper without the required FTC notice is acting in bad faith.

93. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1974).

94. *E.g.*, UNIFORM CONSUMER SALES PRACTICES ACT §§ 1(4), 11(b).

stakes are high enough private litigation cannot only vindicate private rights but can produce a distinct (albeit uneven) policing effect on creditor conduct. At the other extreme, there are many forms of unlawful creditor conduct for which a private remedy is arguably wholly inappropriate—noncompliance with administrative record-keeping requirements, for example. And in the middle is that probably vast number of instances where a creditor is violating the law but where the measurable injury to individual consumers is small or speculative, and where no amount of tinkering with the incentives for private litigation can produce a consistent deterrent or corrective effect. This must be the role of the public agency.

IV. THE EMERGENCE OF NOVEL AGENCY ENFORCEMENT TECHNIQUES

To return to an earlier metaphor, just as police carrying only billy clubs would be ill-equipped to deal with the full range of criminal activity—from parking violations to embezzlement to insurrection—so also would a consumer protection agency be ill-armed if its only weapon were the conventional, prospective-only cease and desist order. The last decade has seen occasions for agencies to try out new weaponry, some forged in their own shops, some requisitioned from the legislative arsenal. Together these occurrences signify an expanding, flexible, adaptive enforcement strategy.

Stung by criticisms from outside evaluators, the Federal Trade Commission began in the late 1960's to add distinctive and novel ingredients to its litigated orders. Tackling credit advertising abuses by a low-income market retailer, the Commission ordered the respondent not only to cease and desist the deceptive advertising practices, but also affirmatively to disclose, orally and in writing, a variety of factors relating to credit charges. This affirmative disclosure order was upheld in the face of the creditor's argument that the recently enacted Truth in Lending Act set the bounds for mandatory credit term disclosures.⁹⁵

Similar instances of mandatory disclosure appeared in cases challenging the fairness of a creditor's routine discounting of consumer credit obligations to holders in due course⁹⁶ and

95. *Tashof v. FTC*, 437 F.2d 707 (D.C. Cir. 1970).

96. *All-State Indus. v. FTC*, 423 F.2d 423 (4th Cir. 1970).

a door-to-door bait-and-switch sales plan for vacuum cleaners.⁹⁷ In each case the Commission directed that subsequent contracts contain explicit disclosures aimed at alerting consumers to the risks involved.

In yet another case,⁹⁸ involving high pressure sales of dance lessons, the Commission's order forbade the seller from taking contracts for dollar amounts above a specified figure—on the theory that this would reduce the incentive for deceptive tactics and afford consumers easier opportunities to terminate the contractual relationship.

Nor were these first signs of more aggressive agency enforcement limited to the FTC. A number of state consumer protection officials undertook elaborate prosecutions of consumer frauds, in the course of which they sought and obtained new forms of relief. In New Jersey, for example, the attorney general successfully sued for declaratory, injunctive, and restitutionary relief on behalf of a class of consumers victimized by unconscionable door-to-door sales practices.⁹⁹ In New York, the attorney general enjoined a referral/pyramid sales scheme in a landmark case,¹⁰⁰ while the New York City Department of Consumer Affairs was less conspicuously conjuring up responses to the most insidious kinds of fraudulent practices.¹⁰¹ An evaluation of the first several years experience in a UCCC state indicated that administrative enforcement was generally strong and not at all hesitant to seek even the drastic remedies of license revocation in appropriate cases.¹⁰²

By the early 1970's, the Federal Trade Commission had asserted broad remedial powers, including corrective advertising, restitution, and trade regulation rule-making. These and other agency devices merit a closer look, both as examples of imaginative agency enforcement devices and as precursors for more of the same.

97. Household Sewing Mach. Co., 77 F.T.C. 1186 (1969).

98. *Arthur Murray Studios, Inc. v. FTC*, 458 F.2d 622 (5th Cir. 1972).

99. *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971). See also *Kugler v. Koscot Interplanetary, Inc.*, 120 N.J. Super. 216, 293 A.2d 682 (Super. Ct. Ch. Div. 1972).

100. *State v. ITM, Inc.*, 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

101. For a colorful description of the enforcement activities of the New York department in the 1970-1971 period see P. SCHRAG, *COUNSEL FOR THE DECEIVED: CASE STUDIES IN CONSUMER FRAUD* (1972).

102. Miller, *Enforcement of the Uniform Consumer Credit Code: Observations from the Oklahoma and Federal Experience*, 51 N.C. L. REV. 1229 (1973).

1. *Undoing Deceptive Advertising*

In a series of cases culminating in *Warner-Lambert v. FTC*,¹⁰³ the Commission has established its power to order an advertiser to ameliorate the residual effects of past deceptive advertising by incorporating corrective messages in future ads. Though not often used in connection with credit advertising, perhaps due to the severe restrictions imposed on credit advertisements by the Truth in Lending Act and the resulting diminution of such advertising, the threat and the burden of corrective advertising orders are clearly a part of the FTC armory.

The novelty of this technique lies in large measure in its attempt to undo past violations. Its implementation does not require statistical proof of actual deception or the measurement of individual consumer damages. Its premise is that the lingering effects of past ad campaigns (which may change only slightly in dropping their deceptive aspects) can best be mitigated by "confessional" ads over a similar period of time or involving similar expenditures.¹⁰⁴

Two possibly ominous clouds hanging over the corrective advertising device have recently been dispelled. Certiorari has been denied in the *Warner-Lambert* case,¹⁰⁵ where the grounds asserted were that corrective advertising is outside the Commission's limited powers (the court of appeals was divided on this point) and that corrective advertising orders infringed on first amendment rights.¹⁰⁶ This latter question is too complex to explore here, except to note an increasing insistence by the

103. 562 F.2d 749 (D.C. Cir. 1977).

104. The order approved in *Warner-Lambert* requires the company to expend a sum on corrective advertising equivalent to the average annual Listerine advertising budget during the 10 years preceding the order, approximately 10 million dollars. *Id.* at 753, [1977] 2 TRADE REG. REP. (Trade Cases) 72,255.

105. Cross-petitions for certiorari were denied in Docket Nos. 77-855 and 77-1118. 46 U.S.L.W. 3613 (April 4, 1978).

106. Judge Robb, dissenting in the court of appeals, noted that the 1975 amendments to the FTC Act, contained in Pub. L. No. 93-637, expressly gave the courts power to order "public notification" concerning violations. From this he deduced that "at least in the judgment of the Congress the Commission does not have, and is not intended to have, the power to order 'public notification' by way of corrective advertising." 562 F.2d at 765, [1977] 2 TRADE REG. REP. (Trade Cases) 72,256.

Though the court had disposed of the freedom of speech question in its original opinion, *Warner-Lambert* sought rehearing on the issue. Without granting the rehearing the court issued a supplemental opinion again upholding the corrective advertising order. *Id.* at 768, [1977] 2 TRADE REG. REP. (Trade Cases) 72,652.

Supreme Court that even commercial advertising is entitled to basic free-speech protections.¹⁰⁷

2. *Mandating Protective Contract Provisions*

Instead of merely prohibiting the future use of contract provisions found to be unfair or deceptive, the FTC has in several instances specified in its orders that certain contractual provisions favorable to consumers (usually a right to cancel) be included in subsequent agreements.¹⁰⁸ This technique, which might be called "contracts of adhesion in reverse," is a direct response to the felt inequality of bargaining power between consumers and creditors; its effect is necessarily prospective only, in the sense that prior customers get no immediate relief from the order.

The more significant instances of an enforcement agency dictating contract terms to creditors have occurred not in the context of individual cases and specific orders, but rather as parts of trade regulation rules. Since this form of rule-making is a novel enforcement technique on its own, it is discussed separately below.

3. *Consumer Redress: Restitution*

As noted above, several state attorneys general have successfully obtained court orders for restitution to consumers of amounts taken from them through deceptive practices. The Federal Trade Commission also has tried its hand at ordering restorative relief and has had its authority in this regard partially affirmed in legislation. And, more recently, the hitherto dormant bank regulatory agencies have shown signs of adopting an aggressive policy of ordering restitution of overcharges by creditor banks. The availability of a *corrective* remedy is the most portentous of all the recent developments, for it breaks

107. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

The denial of certiorari in *Warner-Lambert* does not mean the FTC is altogether out from under the first amendment cloud. See *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977), supplemental opinion, 570 F.2d 164 (7th Cir. 1978), [1978] 1 TRADE REG. REP. (Trade Cases) 73,677, cert. denied, 99 S. Ct. 86 (1978).

108. See, e.g., *Household Sewing Mach. Co.*, 77 F.T.C. 1186 (1969). Mandatory contract provisions also continue to appear in Commission consent orders. See, e.g., *Driver Training Inst., Inc.*, [1978] 3 TRADE REG. REP. (CCH) ¶ 21,387; *American Consumer Serv., Inc.*, [1977] 3 TRADE REG. REP. (CCH) ¶ 21,278.

the shackles of the traditional cease and desist order as the exclusive agency enforcement device.

The FTC

As early as 1971 the FTC began the process of creating a new enforcement dimension for itself, by asserting the authority to order restitution to consumers in appropriate cases.¹⁰⁹ This assertion was not only adventurous on the Commission's part, it was a sharp and striking departure from all prior understanding about the Commission's limited enforcement role. Without rejecting the notion that the agency's role was not to punish or penalize respondents for past conduct, but rather to assure the cessation of unfair or deceptive practices, the Commission rationalized that at times the only effective way to prevent future violations was to deprive the violator of the fruits of previous unlawful conduct.¹¹⁰

The Commission first found such a case in the activities of Universal Credit Acceptance Corporation, a company which had prospered by misrepresenting the nature of its quasi-credit card franchises. The resulting order¹¹¹ not only enjoined future deceptions and required a seven-day cooling off period in all future contracts, but further required refunds of franchise fees and membership dues to all customers in the preceding six years.

The agency's victory was short-lived, however, for on appeal to the Ninth Circuit that court, in *Heater v. FTC*,¹¹² declared restitutionary orders *ultra vires* for the Commission. The Commission's first response was to fight, and it issued a

109. Curtis Publishing Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,719.

110. The Commission justified its authority by stating:

It may well be that in some situations injury to competition resulting from the deceptive practice cannot be adequately remedied by an order which merely enjoins the practice. In such a case refunding of the money obtained by illegal means may be the only effective method of restoring the competitive *status quo* which was disrupted by the deceptive practice While directed at past acts, such an order would be prospective in its effect since it would be designed to restore competition.

Id. ¶ 19,719, at 21,758.

111. Universal Credit Acceptance Corp., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,240.

112. 502 F.2d 321 (9th Cir. 1974).

second restitution order, against Holiday Magic, Inc. (a deceptive pyramid marketing scheme), deferentially stating its disagreement with the Ninth Circuit and its intent to seek Supreme Court review of *Heater*.¹¹³ But it then reopened the Holiday Magic case, announced that it was dropping its request for Supreme Court review of *Heater*, and dropped the restitution portion of the Holiday Magic order.¹¹⁴

The reason for the FTC's turnabout was clear: there was serious doubt the Supreme Court would—or should—reverse the Ninth Circuit; in addition, Congress had come to the rescue, in part, by enacting the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, which was signed into law on January 4, 1975.¹¹⁵ Among other things that Act added a new section 19 to the FTC Act expressly authorizing the Commission to seek judicial restitution remedies in certain cases. In the language of the Act, the relief sought by the Commission “may include, but shall not be limited to . . . the refund of money or return of property [and] the payment of damages”¹¹⁶

The statutory addition may be a mixed blessing. It resolves questions of the Commission's authority to seek restitution for consumers, but it specifies this power for only two types of misconduct: violations of a trade regulation rule and violations of an actual cease and desist order applicable to that respondent.¹¹⁷ Thus, for the Commission to seek consumer redress under section 19 it must first have promulgated a rule or entered an order proscribing the respondent's activities with some specificity. In addition, a restitutionary remedy may be ordered by the court only where the proscribed conduct is such

113. *Holiday Magic, Inc.*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,757. In its footnote 11 to this order the Commission stated:

The Commission is fully aware of the decision by the Ninth Circuit Court of Appeals declaring that it may not order restitution of retained monies obtained as a result of violations of the FTC Act occurring prior to the entry of a cease-and-desist order With all due respect for the court, the Commission believes that the court's decision in this matter is incorrect, and the Commission will seek to obtain review of this decision by the Supreme Court.

Id. ¶ 20,757, at 20,617.

114. *Id.* ¶ 20,819.

115. Federal Trade Commission Improvement Act of 1974, tit. II, Pub. L. No. 93-637, 88 Stat. 2545 (amending 15 U.S.C. §§ 45-57c (1970)).

116. Federal Trade Commission Act § 19(b), 15 U.S.C. § 57b(b) (1976).

117. *Id.* §§ 19(a)(1)-(2), 19(b), 15 U.S.C. § 57b(a)-b(b).

that "a reasonable man would have known under the circumstances [that it] was dishonest or fraudulent."¹¹⁸

There may be a further loophole in the statutory "redress" provision. It is unclear on the face of the statute whether restitution can be ordered only with respect to conduct occurring after entry of a cease and desist order or whether, once an order has been entered, the Commission may then seek redress with respect to all past conduct of the same kind. One authority¹¹⁹ seems to assume that suits for consumer redress cannot have an *ex post facto* effect—that is, the Commission may only sue for redress for conduct occurring after an existing order has been violated. The Commission, however, apparently assumes the right to seek restitution even for past conduct which becomes subject to an order, provided of course that the respondent had reason to know it was "dishonest or fraudulent" at the time.¹²⁰

Unless the Commission's interpretation of the Act is correct, creditors will be immune from an award of restitutionary relief so long as they can avoid the entry of a final cease and desist order. Restitution would hinge altogether on the timing of that final order. In this form "consumer redress" would be a hollow sanction. A final resolution of this ambiguity must await judicial review, but despite some unfortunate grammar in the statutory amendment, a plausible reading of it supports the propriety of retroactive awards.¹²¹ Should a court conclude

118. *Id.* § 19(a)(2), 15 U.S.C. § 57b(a)(2).

119. D. ROTHSCHILD & D. CARROLL, *supra* note 36, at 106. *But see* Kintner & Smith, *supra* note 37, at 684, who suggest that the legislative history of the consumer redress provision permits retroactive awards.

120. The Commission has filed two court actions under Federal Trade Commission Act § 19, 15 U.S.C. § 57 (1976), in both of which they appear to be seeking refunds for acts committed prior to entry of a final cease and desist order. *FTC v. Las Animas Ranch, Inc.*, [1978] 3 TRADE REG. REP. (CCH) ¶ 21,377; *FTC v. Glenn W. Turner Enterprises, Inc.*, [1978] 3 TRADE REG. REP. (CCH) ¶ 21,378.

121. Section 19(a)(2) provides that the Commission may seek consumer redress if a person engages in acts or practices with respect to which "the Commission *has issued* a final cease and desist order." (emphasis added.) This language suggests there can be no retroactive award. But subsection (b) goes on to authorize the courts to award redress for injury resulting from "the unfair or deceptive act or practice"—that is, *not* limited to injury resulting from the violation of the order, which would be the appropriate language if redress was limited to post-order activities. It is this latter phrasing that is used with respect to redress for violations of trade regulation rules ("injury . . . resulting from the rule violation"), and the lack of symmetry seems intended.

In addition, the statute of limitations for redress runs for three years "after the

otherwise and vitiate the statutory remedy, the Commission would be left to try to resurrect its inherent equitable power to order restitution—a power the Ninth Circuit has denied it has, and which the Commission has declined to assert openly since *Heater*.¹²²

Where a public agency like the FTC can force violators to disgorge ill-gotten gains, that remedy does more than merely reimburse consumers for their losses. It provides more efficient and uniform relief than individual consumers could collect on their own. It also serves as a powerful deterrent to creditors who skirt the edges of permissible conduct, and it provides a more effective tool than private enforcement could ever be to deal with the “fly-by-night” or “get-rich-quick,” scheme that milks one area for all it is worth and then moves on. But even these advantages are diluted somewhat by the realization that an agency’s legal authority to compel refunds does not assure that the violator’s assets will not have been dissipated through a corporate spider web or into private pockets.

Bank Regulatory Agencies

The unique relationship between the bank regulatory agencies and their “constituencies” has been mentioned above. The regulators’ dominant concern for bank safety and soundness has led to a rather easy-going approach to enforcement, in which consumer credit law violations which turn up in the course of bank examinations or in response to consumer com-

rule violation . . . or the unfair or deceptive act or practice” for which an order is issued. It would be curious to measure the time for commencing an action from the occurrence of the unlawful act if the critical time reference were the issuance of an order. Still further, redress is available only where the conduct is such that a reasonable man would have known it to be dishonest or fraudulent, an odd qualification to place on conduct occurring after, and in the face of, an explicit cease and desist order.

That the consumer redress mechanism does extend to conduct occurring before, and becoming subject to, a cease and desist order is supported in the legislative history. See CONF. REP. NO. 93-1408, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7772-73.

122. Though not overtly ordering restitution in any contested cases since 1974, the Commission has included refund requirements in a number of consent orders dealing with retained credit balances. See, e.g., *The Diners’ Club, Inc.*, [1978] 3 TRADE REG. REP. (CCH) ¶ 21,269. And in another case involving credit balances, the Commission issued a final order requiring the creditor to notify prior customers of their right to a refund of retained balances. (The operative mandate is to *give notice*, not to repay money.) *Genesco, Inc.*, [1977] 3 TRADE REG. REP. (CCH) ¶ 21,319. This latter case comes perilously close to a restitution order on the Commission’s own authority.

plaints are generally dealt with in an informal manner, without the initiation of any formal administrative proceedings. In some respects this preoccupation with matters other than consumer protection is understandable in the bank agencies. Bank solvency (depositor and investor protection) was their traditional concern; consumer protection (for borrowers) was an alien notion for which bank examiners and other agency officials were generally untrained. Against this background it is not surprising that the bank agencies routinely reported "high levels of compliance"¹²³ with Truth in Lending and similar laws: unseen violations do not count.

Congressional prodding has now stirred up some action among the federal bank agencies. For one, the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act directed each bank agency to establish a consumer complaint office;¹²⁴ it also directs the Federal Reserve Board to issue regulations defining "unfair or deceptive acts or practices" by banks and requires the Board to issue companion rules to those issued by the FTC for other creditors.¹²⁵ For another, congressional oversight hearings echoed the general findings of the NCCF Report, to the effect that the bank agencies showed far too little aggressiveness in enforcing consumer credit laws.¹²⁶ Particular concern was voiced at the agencies' failure to seek restitution or refunds of actual overcharges, and a mandate for the bank agencies to order such reimbursements was contained in a pending Truth in Lending simplification bill¹²⁷ which passed the Senate in 1978.

123. The Federal Reserve Board's annual reports to Congress on Truth in Lending for the years 1972 through 1975 all reported "substantial compliance" with that Act. Not until its 1976 report did the Board acknowledge "fairly numerous instances" of violations among national banks and "a significant incidence of noncompliance" among state banks. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, TRUTH IN LENDING ANNUAL REPORT TO CONGRESS FOR THE YEAR 1976, at 2 (1977) [hereinafter cited as 1977 TRUTH IN LENDING ANNUAL REPORT]. By this time the federal agencies had been dragged on the rug before congressional oversight committees for their lax enforcement. See generally, *Oversight Hearings on Consumer Protection Activities of Federal Banking Agencies Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. (1976) [hereinafter cited as *Oversight Hearings*].

124. Federal Trade Commission Act § 18(f)(1), 15 U.S.C. § 57a(f)(1) (1976), as amended by Pub. L. No. 93-637, § 202(a), 88 Stat. 2545.

125. *Id.*

126. S. REP. NO. 94-1388, 94th Cong., 2d Sess. (1976); H.R. REP. NO. 95-280, 95th Cong., 1st Sess. (1977).

127. S. 2802, 95th Cong., 2d Sess. § 8(b) (1978); see S. REP. NO. 95-720, 95th Cong., 2d Sess. 11-12 (1978).

Seeing the handwriting on the wall, the agencies have reacted. The three major bank regulators (the Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance Corporation) have initiated special programs for training bank examiners in the details of consumer credit laws.¹²⁸ All three agencies have begun conducting separate consumer compliance examinations, and the Comptroller actually ordered refunds of overcharges in some cases.¹²⁹

More recently the three bank agencies, plus the Federal Home Loan Bank Board and the National Credit Union Administration, have issued a set of uniform guidelines for their enforcement of the Truth in Lending Act.¹³⁰ The accompanying announcement said that the guidelines were intended to "promote improved and uniform enforcement . . . through corrective action, including reimbursement, for borrowers who have been overcharged or otherwise harmed by violations of the Act."¹³¹ The guidelines suggest the agencies mean business. For examples, in closed-end credit transactions where the annual percentage rate is understated, the creditor would have to refund any finance charge in excess of the disclosed rate;¹³² if no APR were disclosed the creditor would have to refund a portion of the actual rate imposed;¹³³ if credit insurance options or premiums were mis-disclosed, either the consumers would get a right to cancel including a refund of all the premium paid, or the insurance would be treated as required, with the premiums constituting an overcharge.¹³⁴

These guidelines are a momentous step for the federal bank regulators; the message to the banks is clear. No longer can they expect a fraternal handshake and a "go and sin no more" reaction from their regulators. In addition, the financial

128. 1977 TRUTH IN LENDING ANNUAL REPORT, *supra* note 123, at 7-8.

129. See generally the testimony of the three bank regulatory agencies in Hearings on S. 1312, S. 1501, and S. 1633 before the Subcommittee on Consumer Affairs of the Senate Committee on Banking, House and Urban Affairs, 95th Cong., 1st Sess. (1977) [hereinafter cited as *TIL Simplification Hearings*].

130. The guidelines were originally proposed in November, 1977. 42 Fed. Reg. 55,786 (1977). At this writing there is substantial agreement among the five agencies on the form of the final guidelines, but they have not yet been published in the Federal Register.

131. *Id.*

132. Guidelines § 4(a) (Nov. 1977).

133. *Id.* § 4(b).

134. *Id.* § 6.

exposure for banks could be substantial. Consider, hypothetically, a bank which has inadvertently miscalculated (and so understated) the APR in all of its personal, auto, and mortgage loans for the past year, or—even worse—in all its loans since 1974, the cut-off date for the guidelines. The bank could be required to refund millions of dollars in excess charges.

The federal agencies have also issued proposed guidelines¹³⁵ for the enforcement of Regulation B (implementing the Equal Credit Opportunity Act). That regulation deals with credit discrimination rather than cost disclosure, and restitution is not the appropriate remedy in most cases since violations do not produce a measurable overcharge. The Regulation B guidelines, as proposed, therefore stress other corrective remedies—"affirmative advertising" directed at previously discouraged classes of applicants, publicity for nondiscriminatory loan policies, and reevaluation of previously rejected applicants in accordance with nondiscriminatory standards. Even here, however, there is an element of the restitution idea, for creditors will be required to refund fees and prepayment penalties incurred by the customer in taking the new loan.

At least a few state bank supervisors are emulating their federal counterparts.¹³⁶ Certainly some state banking commissioners have been actively pressing the enforcement of consumer protection laws, and it is likely that patterns of ordering restitution established by the federal agencies will more and more become models for state activity.

4. *Notification to Consumers: Publicity for Violators*

There has been of late some considerable discussion and controversy over the desirability of having public agencies disclose or otherwise publicize the existence of violations discovered by those agencies through investigations or examinations.

135. The proposed guidelines were published simultaneously by the Comptroller of the Currency, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Federal Reserve Board, and the National Credit Union Administration in July 1978. 43 Fed. Reg. 29,256 (1978). These guidelines have been less controversial than those for TIL enforcement and will likely be adopted by the time this article appears.

136. Several state officials have instituted a policy of ordering rebates of overcharges. See Advisory Opinion #1 of the Maine Bureau of Consumer Protection, set out in *TIL Simplification Hearings*, *supra* note 129, at 415, and testimony of Carol S. Greenwald, Massachusetts Comm'r of Banks, *id.* at 366-67.

The same provision of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act that authorized the Commission to seek consumer redress in court also authorized the courts to give relief in the form of “public notification respecting the rule violation or the unfair or deceptive act of practice.”¹³⁷ Presumably this contemplates some form of specific or generalized publicity about the case, beyond what would appear in court records. Since no judgments have been entered under that section yet, examples of what courts will do must abide the event.

Some members of Congress have proposed¹³⁸ giving the federal enforcement agencies themselves discretionary authority to publicize violators of the Truth in Lending Act, but this provision did not survive the Senate Banking Committee’s consolidated markup of several TIL simplification bills. As an indicator of agency attitudes toward this device, the Comptroller of the Currency vigorously—and successfully—resisted a Freedom of Information Act request, from Consumers Union, for the identity of banks detected in noncompliance with Truth in Lending, on grounds of confidentiality.¹³⁹ At the other extreme, at least one state credit code administrator has adopted the policy of routinely notifying affected consumers of violations discovered in the course of creditor examinations.¹⁴⁰

Several distinct enforcement purposes are served by notifying consumers or by giving some general notoriety to violators. Obviously, consumers will be “notified” whenever the enforcement agency orders corrective action as to them. Individual consumers conceivably might then press for private remedies, but if the agency also has ordered corrective action the creditor may genuinely complain of double jeopardy. It is difficult to justify, for example, awarding the consumer twice the finance charge in a transaction for which the creditor has already refunded the excess charge at the behest of the supervisory agency.¹⁴¹ On the other hand, a consumer who is notified

137. Federal Trade Commission Act § 19(b), 15 U.S.C. § 57b(b) (1976).

138. S. 1312, 95th Cong., 1st Sess. § 4 (1977).

139. *Consumers Union v. Heimann*, 47 U.S.L.W. 2167 (1978).

140. Testimony of John Quinn, Maine Bureau of Consumer Protection, *Oversight Hearings*, *supra* note 123, at 44.

141. A possible solution would be to reduce any individual consumer’s judgment award by the amount of any agency-ordered restitution. See the Maine Advisory Opinion #1, *supra* note 136. But this would seem to require some corresponding statutory

by agency officials of his continuing right to rescind a transaction may properly choose to exercise that right. Public embarrassment of creditors, through press-release publicity, may provide some incentive toward compliance, but as one United States senator pointed out in the Banking Committee markup of such a proposal, it is rather inconsistent to prohibit creditors from publishing "shame lists" of defaulting consumers (as is provided in the recent Fair Debt Collection Practices Act¹⁴²) but invite enforcement agencies to do just that to defaulting creditors.

Judiciously used, publicity may be a valuable auxiliary weapon for public agencies. The ground rules thus far enacted or proposed may not be sufficient safeguards to prevent misuse of the technique, but the very experimental nature of the publicity tool makes any attempt at final evaluation mere conjecture.

5. *Trade Regulation Rules*

For an enforcement agency like the FTC, whose resources can never permit it to keep day-to-day track of the activities of all the creditors subject to its jurisdiction, nor prosecute all violators on a case-by-case basis, an effective alternative (or supplementary) enforcement technique might lie in the issuance of rules having the force of law and setting out with precision what is unlawful conduct. In theory at least, such rules would provide guidance and certainty for creditors and would ease the agency's prosecution burdens by eliminating the need to prove deception or unfairness in individual cases. Also, if one assumes that the mere promulgation of standards will induce most law-abiding creditors to conform their practices accordingly, the issuance of trade regulation rules can be a very efficient enforcement mechanism.

This thinking led the Commission to begin issuing such rules in the 1960's.¹⁴³ Since this enforcement mode was novel, and involved the agency's arrogating to itself the powers of a

amendment to the private civil penalty provisions. The Senate-passed Truth in Lending simplification bill, S. 2802, is therefore incomplete in failing to integrate agency restitution powers with private remedies.

142. Pub. L. No. 95-109, § 806(3), 15 U.S.C.A. § 1692d(3) (West Supp. 1978).

143. D. ROTHSCHILD & D. CARROLL, *supra* note 36, at 121-35, reviews the origin of these rules.

mini-legislature, it was inevitable that an affected industry would challenge the FTC's authority to promulgate binding trade regulation rules. The now famous case was *National Petroleum Refiners Association v. FTC*.¹⁴⁴ At issue was an FTC rule requiring the posting of gasoline octane ratings at service station pumps. In a lengthy review of the legislative history of the FTC Act, the Court of Appeals for the District of Columbia upheld the Commission's rule-making authority.

To remove any further doubt, Congress in 1975 amended section 18 of the FTC Act to give the Commission explicit power to issue rules,¹⁴⁵ although only via an elaborate administrative hearing process.¹⁴⁶ While there can no longer be any question of the Commission's basic authority in this regard, it is worth noting and evaluating the kinds of rules they have issued affecting consumer credit transactions.

The two existing rules with major impact in the credit area were both issued on the Commission's own authority rather than under the aegis of amended section 18. The first deals with door-to-door sales and seeks to assure that consumers have a chance to change their minds, to cool off.¹⁴⁷ The rule is not limited to credit transactions, though it generally parallels the Truth in Lending provisions requiring notice and a right of rescission in certain real estate credit transactions. The mechanics of the rule spell out a contractual provision and disclosure which door-to-door sellers must incorporate in their agreements and which then becomes a more or less self-executing part of the contract between seller and buyer.¹⁴⁸ Sellers who violate this rule are obviously subject to Commission prosecution, but perhaps not to consumer redress under new section 19 of the FTC Act.¹⁴⁹ In light of the prevailing view that there is no private right of action for violation of the FTC Act, it is

144. 482 F.2d 672 (D.C. Cir.), *cert. denied*, 415 U.S. 951 (1973).

145. Federal Trade Commission Act § 18(a)(1)(B) (1970), *as amended by* Pub. L. No. 93-637, § 202(a), 88 Stat. 2545.

146. *Id.* § 18(b)-(e).

147. 16 C.F.R. § 429 (1974).

148. *Id.* § 429.1(b).

149. This qualification is due to the fact that consumer redress under new section 19 lies for violation of "any rule *under this Act*," which may limit the remedy to violations of rules issued under the specific statutory mandate in section 18. The door-to-door sales rule, of course, was issued under the Commission's general authority as confirmed in *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir.), *cert. denied*, 415 U.S. 951 (1973).

unclear what the position of an individual consumer would be if the seller violates the rule. In a case construing the rule,¹⁵⁰ however, the court granted the consumer the right to rescind without even acknowledging the precedents barring private relief.

The other credit-oriented rule is that on "Preservation of Consumers' Claims and Defenses"¹⁵¹—effectively abolishing the holder-in-due-course doctrine. Again the technique used is to require creditors to incorporate into consumer credit agreements provisions that affirmatively preserve consumer rights against subsequent holders of those obligations. Under the current version of this rule the compliance burden is placed exclusively on sellers, even with respect to "purchase money loans"¹⁵² made by banks or others. In this, the rule has the effect of expanding the Commission's jurisdiction somewhat, for while the FTC cannot directly regulate banks this rule subjects them to immense practical pressure to cooperate with sellers by including the specified language in notes and other loan agreements. At the same time the present holder rule was promulgated, in November 1975, the Commission proposed an amendment which would extend the compliance duty to any third-party creditors who took consumer obligations from sellers.¹⁵³ Should this amendment be adopted, the Federal Reserve Board would then be required to adopt a companion rule for banks.¹⁵⁴

Industry reaction, especially to the "holder" rule, has been extremely hostile. A suit was brought to enjoin the rule from going into effect;¹⁵⁵ several bills were introduced in Congress to repeal it.¹⁵⁶ These efforts collapsed, and at this writing none of industry's dire predictions about the effects of the rule appear to have materialized. The animosity to FTC rule-making continues, however. In the recent Fair Debt Collection Practices

150. *Donnelly v. Mustang Pools, Inc.*, 84 Misc. 2d 28, 374 N.Y.S.2d 967 (Sup. Ct. 1975).

151. 16 C.F.R. § 433 (1975).

152. *Id.* §§ 433.1(d), 433.2(b). The phrase includes direct loans made by lenders to finance specific purchases from dealers with whom the lender maintains referral or affiliation relationships.

153. 40 Fed. Reg. 5350 (1975).

154. This is by virtue of the mandate for parallel rules now contained in section 18(f)(1) of the Federal Trade Commission Act. 15 U.S.C. § 57(f)(1) (1976).

155. *National Auto. Dealers Ass'n v. FTC*, 421 F. Supp. 31 (M.D. La. 1976).

156. S. 3652, 94th Cong., 2d Sess. (1976); H.R. 13,897, 94th Cong., 2d Sess. (1976).

Act, the industry fought hard for, and won, a provision expressly barring the FTC from increasing the restrictions on debt collectors through regulations or trade regulation rules.¹⁵⁷ Now the entire credit industry has mobilized in opposition to the proposed Credit Practices Rule for which the Commission has conducted more than fifty days of hearings around the country.

Industry distaste for rule-making is based on several grounds. Creditors object to the broad nature of the rules and to the ambiguities and lack of precision in them. They object in principle to administrative "legislation" by unelected commissioners. And they question whether the rules reflect realistic assessments by the Commission of the compliance burden and of the anti-competitive impact of these restrictions on creditor rights. The other side of the coin, of course, is that the Commission's expertise and market contacts give it an ideal perspective from which to gauge the need for rule-making and the form it should take. Change through legislation at the federal level is slow, it is said, and may be influenced by political motivations and compromises, while rule-making is a more flexible, responsive device.

No ultimate answer to this philosophical debate is possible. So long as the Commission continues to promulgate rules, their existence is a reality. And there are inducements in the FTC Improvements Act which will likely keep the pipeline flowing: violations of trade regulation rules trigger the availability of consumer redress.¹⁵⁸ In addition the Commission may sue any person who violates a rule for civil penalties of \$10,000 per violation without the intermediate step of an administrative adjudication.¹⁵⁹ Thus the existence of a trade regulation rule strengthens the agency's hand in other ways beyond the automatic compliance it produces.

Similar kinds of guidelines have emerged from other federal agencies. The Federal Home Loan Bank Board, for example, has adopted regulatory rules and underwriting guidelines to deal with the housing discrimination pattern called "redlining."¹⁶⁰ The Comptroller of the Currency has issued a

157. 15 U.S.C.A. § 1692l(d) (West Supp. 1978).

158. Federal Trade Commission Act § 19(a)(1), 15 U.S.C. § 57b(a)(1) (1976).

159. *Id.* § 5(m)(1)(A), 15 U.S.C. § 45m(1)(A).

160. 12 C.F.R. § 531.8 (1978) (as amended by 43 Fed. Reg. 22,332).

regulation forbidding bank officials from reaping the profits from credit insurance¹⁶¹—an indirect attack on the overpricing of such coverages. And, in the states, little FTC acts have included rule-writing authority for the administrator.¹⁶²

The significance of agency rules as prospective enforcement devices is growing, especially as the FTC continues to engage in this activity. Federal Trade Commission rules automatically create uniform national standards, bypassing state legislatures, and if broad rules such as that proposed by the Commission for Credit Practices are adopted, the effective regulation of consumer credit transactions will have almost wholly shifted into federal hands.

6. Other Quasi-Enforcement Techniques

Two other types of enforcement agency activity bear mention here, though they do not directly involve the policing of creditor conduct. One type is the conduct of educational programs by the agencies, with the goal of simply making consumers more informed of their rights in, and the terms of, credit transactions. Probably every agency engages in this activity to some extent, by providing speakers for public programs, or by preparing and distributing brochures or similar material through the schools, through creditor outlets, or by direct mail in response to inquiries.¹⁶³ There is evidence that some enforcement agencies are making a special effort in this regard—a noteworthy example being the "DownEaster's Pocket Credit Guide" distributed by the Maine Department of Consumer Protection.¹⁶⁴

A bill¹⁶⁵ introduced in the Senate as part of the Truth in Lending simplification effort would have required the Federal Reserve Board to collect and disseminate prevailing credit rates in order to educate consumers, but the provision was scaled back to a one-shot demonstration project in the final

161. 41 Fed. Reg. 29,846 (1976).

162. *E.g.*, UNIFORM CONSUMER SALES PRACTICES ACT § 6(b).

163. See Testimony of James A. McCaffrey, Deputy Administrator, Oklahoma Dep't of Consumer Affairs, in *TIL Simplification Hearings*, *supra* note 129, at 383, 390.

164. See Testimony of John E. Quinn, Superintendent, Maine Bureau of Consumer Protection, *id.* at 405-06. The "Guide" describes how to shop for credit and also contains a series of tables showing at a glance the actual cost of credit at various interest rates and terms.

165. S. 1312, 95th Cong., 1st Sess. § 15 (1977).

Senate bill.¹⁶⁶ One difficulty with this proposal is feasibility: it would take massive efforts to collect, verify, collate, and publish the data, and as guides to prevailing rates the data would probably be out of date before consumers saw it. More generalized, explanatory information, however, should have a cumulative effect over time in raising the level of consumer sensitivity to legal rights, and it is the informed consumer who is likely to initiate "enforcement" action, either on his own or by complaining to a public agency.

A last technique appears where enforcement officials seek declaratory judgments concerning the applicability and scope of consumer credit laws. An instance is the recent series of cases in which state attorneys general have successfully sought declarations that local consumer protection laws are applicable to out-of-state creditors who deal with local residents. In *Aldens, Inc. v. LaFollette*,¹⁶⁷ the leading case, the Seventh Circuit Court of Appeals sustained the argument of the Wisconsin Attorney General that Wisconsin statutes applied to open-end credit agreements between the Chicago mail order house and Wisconsin residents, despite the fact that all transactions were solicited from Chicago and the agreements were accepted there. Obviously the applicable Wisconsin laws are more favorable for consumers than those invoked by the creditor in Illinois, so the result of the holding is to establish a firmer base from which individual consumers or local consumer protection agencies can assert rights and remedies against the creditor—rights and remedies that would remain clouded absent the declaratory judgment.

Like education, obtaining judicial clarification of applicable laws is not a direct enforcement technique. But its efficient resolution of an otherwise debatable threshold question allows other enforcement weapons to operate more freely.

V. A RATIONALE FOR EXPANSIVE AGENCY ENFORCEMENT

The 1978 defeat of the proposed new Federal Agency for Consumer Advocacy (the "Consumer Protection Agency," which has been the major goal of consumerists for many years)

166. S. 2802, 95th Cong., 2d Sess. § 18 (1978).

167. 552 F.2d 745 (7th Cir.), *cert. denied*, 434 U.S. 880 (1977). *See also* *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975), *cert. denied sub nom. Aldens, Inc. v. Kane*, 425 U.S. 943 (1976).

evidences at least political and industry reluctance to add to the strata of governmental bureaucracy. If the answer to better enforcement of consumer protection laws lies neither in creating new agencies nor in continued tinkering with the inducements to private enforcement, some substantial gains may already have been realized in the development of new techniques for existing agencies.

Without arguing for, or assuming, the need for increased budgets or staffs for existing federal and state agencies, their judicious use of new and alternative enforcement devices can contribute to more flexible, adaptive, consistent enforcement strategies. This may be especially true in the consumer credit area, which is already crisscrossed with federal and state laws and rules and where creditors acting in good faith face compliance responsibilities with no real certainty they can cross every "t" and dot every "i." Even further is this true with respect to the credit area if one acknowledges that "violations" are often technical, and actual consumer damage speculative, factors which depress motivations for private enforcement except in unusual settings like Truth in Lending.

Deterrence and prevention are primary goals of any enforcement scheme, for consumers should be entitled to law-abiding conduct from creditors and should not have to worry about extricating themselves from the consequences of unlawful practices. A number of the newly developed agency techniques lend themselves readily to these goals (and do so far better than the traditional cease and desist order device): trade regulation rule writing is the strongest example, but all the devices discussed above have the capacity to promote compliance to some degree. And however wrenching were the FTC's "holder" rule, or the Seventh Circuit's decision in *LaFollette*, to the creditors affected by them, one can at least believe that the costs and burdens of adjusting to those new standards are somewhat offset by the savings in private litigation over those same issues.

The major new departure is the ability of public agencies to order "consumer redress"—specific refunds of money, property, or the like to customers. With this power, agencies can make a real dent in the need for extensive private litigation, which heretofore has been virtually the exclusive route to a private remedy. Prompt agency action, including the attachment or freezing of creditor assets, can assure a source of recov-

ery for consumers in cases where they might otherwise have been left with uncollectible judgments. Agency proceedings for restorative relief also avoid the complexities and court burdens incident to private class actions or multiple individual actions.

The availability of an array of enforcement weapons for the public agency may have other beneficial, though less tangible, effects. An agency may now effectively combine deterrent and corrective relief in a single proceeding, thus bridging what were previously distinct agency and private enforcement roles. The introduction of specific compliance duties into agency orders or rules may in fact give creditors protection against subsequent challenges in private litigation. The very process of developing trade regulation rules through open hearings, with cross-examination, and with financial support for the participation of appropriate consumer representatives,¹⁶⁸ may reduce polarization between consumer and industry camps—or at least improve the dialogue between them.

To all of this, several final words—somewhat in the nature of a *caveat lector*—must be added. The thesis of this paper is that the range of enforcement techniques currently being used by various enforcement agencies has, collectively, the potential for giving public agencies a much improved role in the implementation of consumer credit laws. The writer assumes neither that we have already reached that ideal, nor that the course to it is obstacle-free.

Probably no single existing agency, state or federal, has experimented with all the described techniques. It is therefore impossible to say how effective the whole complement would be within a single enforcement jurisdiction. In addition, the existence of new enforcement methods does nothing to reduce the fragmentation of enforcement responsibility through federal, state, and local agencies. Frictions attributable to jurisdictional overlaps, or gaps, will continue.¹⁶⁹ So too, probably,

168. Recent amendments to the FTC Act permit the Commission to compensate consumer representatives or others for expenses of participating in rule-making proceedings. Federal Trade Commission Act § 18(h), 15 U.S.C. § 57a(h) (1970), as amended by Pub. L. No. 93-637, § 202(a), 88 Stat. 2545.

169. For example, the Massachusetts Commissioner of Banks has engaged in a heated, three-cornered debate over her authority to enforce state consumer protection laws against federally-chartered banks and thrift institutions. See Testimony and Statement of Carol S. Greenwald, *TIL Simplification Hearings*, *supra* note 127, at 359-90.

will the shortage of resources for many agencies.

A more serious possible impediment to optimum use of new enforcement techniques is inherent in their flexible, discretionary nature. The danger is that the agencies simply will not use good judgment—that they will lapse back into cozy relationships with the industries they supervise or, at the other extreme, that they will view themselves as crusaders carrying on a holy war for every conceivable consumer advantage. No paper charter of enforcement options can prevent excesses in their under-use or over-use. The good judgment of any enforcement agency is probably the end product of its tradition, its statutory mandates, and the aggregate good sense of its current personnel. At times a given agency may need to be coaxed or ordered into a more active role; at other times legislative or executive brakes may need to be applied. These considerations do not, however, undercut the conclusion that public agencies equipped with better enforcement tools can better serve the public good.

